

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HEALTH**

In the Matter of the Involuntary
Discharge/Transfer of B.O.,
Petitioner, by Long Lake
Health Care Center, Respondent

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

Administrative Law Judge Steve M. Mihalchick conducted a hearing in this contested case proceeding beginning at 9:30 a.m. on Friday, April 20, 2001, at Long Lake Health Care Center, 345 North Brown Road, Long Lake, Minnesota.

Cherie Camuel, Administrator, 345 North Brown Road, Long Lake, Minnesota 55356, represented Long Lake Health Care Center (Long Lake) at the hearing. B.O. (the Petitioner) was represented at the hearing by her son, W.O. Also in attendance at the hearing was Ernie Kulas, Senior Social Worker for Hennepin County, Jim Dostal, Ombudsman for the Advocacy Center for Long-Term Care, and Connie Cobb, Director of Financial Affairs for Long Lake. A telephone hearing was held on Thursday, April 26, 2001, at 2:30 p.m., to supplement the record on B.O.'s progress toward Medical Assistance qualification. The record closed on April 26, 2001, when the telephone conference ended.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Health will make the final decision after reviewing the hearing record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minnesota Law,^[1] the Commissioner may not make her final decision until after the parties have had access to this Report for at least ten days. During that time, the Commissioner must give each party adversely affected by this Report an opportunity to file objections to the report and to present argument. Parties should contact the office of Jan Malcolm, Commissioner, Department of Minnesota, 85 East Seventh Place, Suite 400, St. Paul, Minnesota 55101, to find out how to file objections or present argument.

STATEMENT OF THE ISSUES

Whether the Petitioner and the Petitioner's financially responsible son have failed, after reasonable and appropriate notice, to pay for the care that the Petitioner has received at Long Lake.

Based upon the record in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Petitioner is an elderly woman who has significant cognitive disabilities.^[2] She is in need of a significant level of care and has been classified as Case Mix Level J.

2. The Petitioner became a resident at Long Lake in October, 1999. The Petitioner's son, W.O. holds a power of attorney to handle B.O.'s affairs.

3. Since her admission, the Petitioner has been a private paying resident of Long Lake and has not been a recipient of Medical Assistance (MA) benefits from the State of Minnesota. The Petitioner receives a Social Security retirement benefit. She has no other income.

4. At the time of her admission the Petitioner owned only two significant assets: undeveloped land in Idaho and New Mexico. The land in Idaho was held jointly by B.O. and her husband, who lives elsewhere. The New Mexico land is owned by B.O., but presumably her husband has some legal interest in it. B.O. has an ownership interest in the home currently occupied by the Petitioner's husband, but that is his homestead and excluded when determining MA disability.

5. Long Lake sent W.O. a Notice of Discharge by letter dated March 6, 2001. The Notice indicated that B.O.'s account was in arrears in the amount of \$48,701.^[3] The letter also stated, "Long Lake Healthcare Center intends to fulfill its legal obligations in performing appropriate discharge planning."^[4]

6. Long Lake was concerned that W.O. was not proceeding quickly enough with disposing of the land and applying it to B.O.'s bill.

7. W.O. had some difficulties dealing with his siblings regarding payment for B.O.'s care. But he has sold the Idaho land and now has the New Mexico land listed for sale.

8. On March 23, 2001, W.O. paid \$15,750.00 to Long Lake for B.O.'s care. As of the date of the hearing, B.O. was in arrears a total of \$37,496.48 for care at Long Lake.^[5] An additional \$10,000.00 was paid on the date of the hearing. That money was derived from the sale of land in Idaho.

9. W.O. has initiated the process to qualify B.O. for MA payments. He met with a Financial Worker from Hennepin County on April 23, 2001. The worker requested some additional documentation, but it appears that the application is progressing. W.O. was informed that the application was effective April 1, 2001 and that MA would pay for the preceding three months prior to the application date as soon as B.O. qualified for MA payments.

10. Long Lake's letter to T.O. dated March 6, 2001 notified the Petitioner and T.O. of its intention to discharge the Petitioner on April 4, 2001, because her account with Long Lake was \$48,701 in arrears and over 120 days past due.^[6] A copy of that letter was sent to Hennepin County Adult Protection. That discharge notice provided the Petitioner with the address of the Ombudsman for Older Minnesotans and provided information about her rights to file an appeal of the decision to discharge her with the Department.^[7]

11. Long Lake has conducted no orientation or preparation to ensure the safety and orderly transition of the Petitioner to a new residence.

12. The Petitioner requested a hearing on March 30, 2001.^[8] The Minnesota Department of Health issued a Notice of and Order for Hearing on April 3, 2001.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Both Minnesota and federal law^[9] give the Administrative Law Judge and the Commissioner of Health authority to conduct this proceeding, to consider whether Long Lake's proposed discharge of the Petitioner meets the requirements of the law, and to make findings, conclusions, and orders about that issue.

2. The Department gave the Petitioner and her son, T.O., proper and timely notice of the hearing in this matter, and the Department has complied with all of the law's substantive and procedural requirements.

3. Minnesota's "Bill of Rights" for nursing home residents provides them with the following rights with regard to discharges or transfers:

Residents shall not be arbitrarily transferred or discharged. Residents must be notified, in writing, of the proposed discharge or transfer and its justification no later than 30 days before discharge from the facility and seven days before transfer to another room within the facility. This notice shall include the resident's right to contest the proposed action, with the address and telephone number of the area nursing home ombudsman pursuant to the Older Americans Act, section 307(a)(12). The resident, informed of this right, may choose to relocate before the notice period ends. The notice period may be shortened in situations outside the facility's control, such as a determination by utilization review, the accommodation of newly-admitted residents, a change in the resident's medical or treatment program, the resident's own or another resident's welfare, or nonpayment for stay unless prohibited by the public program or programs paying for the resident's care, as documented in the medical

record. Facilities shall make a reasonable effort to accommodate new residents without disrupting room assignments.^[10]

4. Under both federal and state law,^[11] a nursing home's notice of intent to discharge a resident must include notice of the state's process for a resident's right to appeal, the reasons for the proposed discharge, and the name, mailing address, and telephone of the state's long term care ombudsman.

5. The Petitioner filed a timely appeal from Long Lake's notice of its intention to discharge her.

6. Under applicable federal law, a nursing home must neither transfer nor discharge a resident but must allow the resident to remain in the facility unless, *inter alia*:

[t]he resident has failed, after reasonable and appropriate notice, to pay (or to have paid under this subchapter or subchapter XIX on the resident's behalf) for a stay at the facility.^[12]

7. Long Lake has the burden of proof in this proceeding to establish by a preponderance of the evidence that the Petitioner has failed, after reasonable and appropriate notice, to pay for her stay at Long Lake.^[13]

8. Before Long Lake issued its notice of intent to discharge the Petitioner, it gave her reasonable and appropriate notice of the arrearages that she owed to Long Lake and made demand for payment.

9. Petitioner's son is making diligent efforts and reasonable progress in selling the remaining assets Petitioner owns and in qualifying Petitioner for Medical Assistant, all of which should provide full payment to Long Lake. Therefore, Long Lake has failed to establish by a preponderance of the evidence that the Petitioner has failed, after reasonable and appropriate notice, to pay for the Petitioner's stay at Long Lake.

10. Under 42 C.F.R. § 483.12(a)(7), "A facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility."

11. Long Lake has not engaged in a process of reasonable discharge planning on the Petitioner's behalf and has not provided sufficient preparation and orientation to ensure the Petitioner's safe and order discharge from the facility.

12. Under the current circumstances, Long Lake cannot discharge the Petitioner from its nursing facility.

Based upon these Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commissioner grant the Petitioner's appeal and deny Long Lake's request to discharge her, without prejudice to Long Lake's right to issue another notice of discharge if arrangements for full payment are not completed within 60 days of the Commissioner's Order.

Dated this 8th day of May 2001.

S/ Steve M. Mihalchick

STEVE M. MIHALCHICK

Administrative Law Judge

NOTICE

Under Minnesota law,^[14] the Commissioner must serve her final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

The issue to be determined in this contested case as set out in the Notice of Hearing in this matter is whether Long Lake "may lawfully discharge B.O., a resident of the facility, under sections 1819(c)(2) and 1919(c)(2) of the Social Security Act, 42 USC §§ 1395i-3(c)(2) and 1396r(c)(2), and 42 C.F.R. § 483.12." The primary determination in appeals from proposed discharges for nonpayment is whether:

[t]he resident has failed, after reasonable and appropriate notice, to pay (or to have paid under this subchapter or subchapter XIX on the resident's behalf) for a stay at the facility.^[15]

The Petitioner is not yet current in her bill with Long Lake. But the payment of \$25,750, the imminent qualification of the Petitioner for MA payments, and the three-month "look back" MA payments that will accrue to Long Lake renders discharging her at this time inappropriate.

The Petitioner's son has made every reasonable effort to obtain MA qualification for his mother. Long Lake indicated that the purpose of the proceeding was not to force Petitioner's discharge, but to establish a conservatorship to obtain the necessary power to compel certain financial transactions, thereby resulting in MA qualification for the

Petitioner. The needed financial transactions appear to be nearing completion. This is an additional basis for denying the request to discharge the Petitioner at this time.

Under 42 C.F.R. § 483.12 (a)(7), a facility seeking to discharge a resident must engage in “sufficient preparation and orientation.” As the Ombudsman pointed out at the hearing, there is no evidence that Long Lake engaged in any prior planning or orientation as required for discharging a resident. Simply announcing that the Petitioner will be discharged to the care of her son does not meet the federal requirement.

The purposes of bringing the discharge action appear to have been met, without actually discharging the Petitioner. Long Lake has not engaged in required preparation and so cannot discharge the Petitioner at this time. If the Petitioner does not qualify for MA and does not pay the overdue amounts, Long Lake can seek discharge again.

S.M.M.

^[1] Minn. Stat. § 14.61 (2000). (Unless otherwise specified, all references to Minnesota Statutes are to the 2000 edition.)

^[2] T.O.’s testimony.

^[3] Exhibit 1.

^[4] Exhibit 1.

^[5] Exhibit 2. The \$48,701 identified in the March 6, 2001 letter had increased by \$4,545 for a total of \$53,246. After credit is given for the \$15,750 payment, the amount due on the date of the hearing is \$37,496.48.

^[6] Exhibit 1.

^[7] *Id.*

^[8] Notice of and Order for Hearing, at 2.

^[9] Minnesota Statutes, section 14.50, and section 144A.135; Title 42, United States Code, sections 1395I-3(e) and 1396r(e) and Title 42, Code of Federal Regulations, section 483.12.

^[10] Minnesota Statutes, section 144.651, subdivision 29.

^[11] 42 USC §§ 1395i-3(c)(2)(B) and 1396r(c)(2)(B); Minnesota Statutes, section 144.651, subdivision 29, and section 144.135.

^[12] 42 USC §§ 1395i-3(c)(2)(A)(v) and 1396r(c)(2)(A)(v).

^[13] See Minnesota Rules, part 1400.7300, subpart 5.

^[14] Minnesota Statutes, section 14.62, subdivision 1.

^[15] 42 USC §§ 1395i-3(c)(2)(A)(v) and 1396r(c)(2)(A)(v) (codifying §§ 1819(c)(2)(A) and 1919(c)(2)(A) of the Social Security Act).